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23247-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

NICHOLAS A. BAINARD, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF CHELAN COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENT OF ERROR

The court erred in imposing two 60-month consecutive sentences for commission of a felony while armed with a firearm.

B. ISSUES

1. The Sixth Amendment right to a jury trial and the right to proof beyond a reasonable doubt guaranteed by the Due Process Clause of the Fourteenth Amendment prevent the judicial finding of any fact which increases the statutory maximum penalty. Did the trial court violate Nicolas Bainard's Sixth and Fourteenth Amendment rights by making its own determination that the offense was committed while armed with a firearm after the jury returned a special verdict finding the offense was committed while armed with a deadly weapon?
2. Factual findings that increase the maximum penalty are elements of enhanced greater offenses. The Double Jeopardy provisions of the Fifth Amendment bar the prosecution of a greater offense following conviction for a lesser offense. The Fifth Amendment also bars entry of a judgment notwithstanding the verdict in criminal cases no

matter how convincing the evidence of a defendant's guilt on the greater offense. When the jury returns a verdict on the lesser offense of second-degree murder with a deadly weapon finding, but the trial court enters a conviction of second degree murder with a firearm finding, does entry of a conviction for the greater offense violate Double Jeopardy?

3. Does the double jeopardy violation require dismissal of the conviction for the greater offense?
4. Denial of a jury verdict based on proof beyond a reasonable doubt is structural error, which always requires reversal. When the trial court enters a conviction of a greater crime than that found by the jury, does the error require automatic reversal?
5. The Washington Constitution, article 1, §§ 21 and 22, provide a broader right to jury trial than the Sixth Amendment. Can denial of the state right to jury trial ever be harmless?
6. The Due Process Clause requires proof beyond a reasonable doubt of every fact necessary to constitute the crime. When the statute permits a finding the offense was

committed with a deadly weapon other than a firearm, and the jury instructions in clued firearms in the definition of a deadly weapon, does the Due Process Clause preclude resentencing based on a verdicts of second degree murder while armed with a deadly weapon?

C. STATEMENT OF THE CASE

Nicolas Bainard was charged with two counts of first degree murder and one count of first degree arson. (CP 240-242, 283-285, 339-340) The information alleged that in the commission of the murder charges the defendant was armed with a deadly weapon, *citing* RCW 9.94A.533 and .602. (CP 240-41) The information charged that the arson was committed by causing a fire or explosion in a building “in which there was at that time a human being who was not a participant in the crime . . .” (CP 241)

The medical examiner testified that the victims, Ella and Richard Bainard, had died of gunshot wounds and were dead before the building in which they were found was burned. (RP 401-405, 409-10) There was testimony that their son, Nicolas, had made threatening remarks in the presence of his peers. (RP 134, 142, 152) The State presented evidence that he had been in the home during the evening before his parents were

shot and was present and unharmed at the scene of the fire some seven or eight hours later. (RP 171, 305)

The court gave the jury a “to-convict” instruction on the lesser-included offense of second degree murder:

To convict the defendant of the lesser-included crime for count 1 of murder in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 29th day of June, 2003, the defendant shot Richard Bainard with a shotgun;
- (2) That the defendant acted with intent to cause the death of Richard Bainard;
- (3) That Richard Bainard died as a result of the defendant’s acts; and
- (4) That the acts occurred in the State of Washington . . .

(CP 156) The court gave an identical instruction covering second-degree murder of Ella Bainard. (CP 157)

The court gave a special verdict instruction:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in count I. A person is armed with a deadly weapon if, at the time of the commission of the crime, the deadly weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there is a connection among the defendant, the crime, and the deadly weapon.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

(CP 166-67)

The jury returned guilty verdicts on two counts of second degree murder and one count of arson, and special verdicts finding Nicolas was armed with a deadly weapon at the time of the commission of the two murder counts. (CP 129-31, 134-35)

The court granted a defense motion to dismiss the arson conviction, finding that the State had failed to prove that at the time of the arson there was a human being in the building. (CP 39-40) The defense also challenged the sufficiency of the jury instructions and verdict to support sentencing enhancements based on possession of a firearm or deadly weapon. (CP 73-74) The court reasoned that because the jury was instructed that a firearm is a deadly weapon, the jury found Nicolas was armed with a deadly weapon, and therefore must have found he was armed with a firearm. (RP 981-82) The court found the verdicts were sufficient to support firearm enhancements of five years on each of the two remaining counts. (CP 37) The State recommended standard range sentences of 160 months and 165 months on the second degree murder convictions plus two 60 month firearm enhancements. (RP 999-1000) The court imposed a sentence of 450 months confinement, including the two consecutive 60-month firearms enhancements. (RP 1029; CP 25-34)

D. ARGUMENT

1. THE FIREARM ENHANCEMENTS VIOLATE THE CONSTITUTIONAL PROTECTIONS OF THE RIGHT TO JURY TRIAL, DUE PROCESS, AND DOUBLE JEOPARDY.

- a. DEADLY WEAPONS ENHANCEMENTS ARE ELEMENTS OF AGGRAVATED OFFENSES BECAUSE THEY INCREASE THE PENALTY BEYOND THAT PERMITTED BY THE JURY VERDICT.

The Sixth Amendment guarantees a criminal defendant the right to a jury trial. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). This includes the right to “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *Id.* The Sixth Amendment does not allow a defendant to be “expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.” (Emphasis in original) 503 U.S. at 483; *see also Ring v. Arizona*, 536 U.S. 584, 604, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

530 U.S. at 490 (*quoting Jones v. United States*, 526 U.S. 227, 252-53, 119 S. Ct. 1215, 143 L. Ed. 2d 311(1999) (opinion of Stevens, J.))

A sentencing court's ability to impose a sentence is limited to the maximum for that offense reflected in the jury verdict:

[T]he relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to punishment."

(Italics in original) *Blakely v. Washington*, __ U.S. __, 124 S. Ct. 2531, 2537, 159 L. Ed. 2d 403 (2004) (*citing* 1 J. Bishop, *Criminal Procedure*, § 87, p. 55 (2d ed. 1872)).

Within this analytical framework, weapon enhancements are elements of aggravated versions of the underlying offenses. *Apprendi*, 530 U.S. at 494. "The relevant inquiry is one not of form, but of effect - - does the required finding expose the defendant to greater punishment than that authorized by the jury's guilty verdict?" *Id.*

The fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives - whether the statute calls them elements of the offense, sentencing factors, or *Mary Jane* - must be found by the jury beyond a reasonable doubt.

Ring, 122 S. Ct. at 2444 (Scalia concurring).

Imposition of the firearm enhancement requires a finding the defendant was armed with a firearm at the time of the commission of the offense. RCW 9.94A.533(3)(a). Imposition of the deadly weapon enhancement requires a finding the defendant was armed with a deadly weapon other than a firearm at the time of the offense. RCW 9.94A.533(3)(a). A jury must find the facts required to support the enhancements beyond reasonable doubt.

The standard range for Nicolas's offenses, without the firearm enhancement, was 123 to 220 months. (CP 27) The firearm enhancement increased the sentence by a mandatory 60 months. (CP 27) *State v. Brown*, 139 Wn.2d 20, 29, 983 P. 2d 608 (1999); RCW 9.94A.533(3)(a) and (e). The special verdict instruction permitted, but did not require, the jury to find Nicolas was armed with a deadly weapon based on possession of a firearm. (CP 166) Thus the jury found beyond a reasonable doubt that Nicolas was armed with a deadly weapon, but did not find he was armed with a firearm, at the time the offense was committed. (CP 129-35) The two mandatory 60-month sentence enhancements were not supported by the jury findings required by the Sixth Amendment right to a jury trial and the Fourteenth Amendment right to due process. They should be reversed.

b. IMPOSITION OF THE FIREARM
ENHANCEMENTS VIOLATED THE
FIFTH AMENDMENT PROHIBITION OF
DOUBLE JEOPARDY.

A judicial finding that results in conviction of a level of the offense more serious than that found by the jury's verdict violates the Fifth Amendment Double Jeopardy Clause.

No individual shall "be twice put in jeopardy of life or limb for the same offense." U.S. Const. Amend V. The Double Jeopardy Clause protects against a second prosecution for the same offense after conviction. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Fifth Amendment double jeopardy protection is applicable to the states under the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

When a defendant's sentence is based on the jury verdict plus a fact subsequently found by the judge, the defendant has been convicted of an aggravated version of the crime reflected in the jury verdict. *See e.g. Ring*, 536 U.S. at 609; *see also Sattasahn v. Pennsylvania*, 537 U.S. 101, 111, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003) (plurality decision). "We can think of no principled reason to distinguish between what constitutes

an offense for purposes of the Sixth Amendment's jury-trial guarantee and constitutes an 'offense' for purposes of the Fifth Amendment Double Jeopardy Clause." 537 U.S. at 111.

Double jeopardy protections begin when there has been an event, such as an acquittal or a conviction, that terminates the original jeopardy. *Richardson v. United States*, 468 U.S. 317, 325, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984). The Double Jeopardy Clause bars prosecution or conviction of a higher degree of a crime once a conviction or acquittal has been obtained on a lesser degree or included offense. *See e.g. Brown v. Ohio*, 432 U.S. 161, 169-70, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977) (prior conviction for the lesser included offense of joyriding prohibited prosecution of the greater offense of auto theft). This bar exists unless the conviction on the first offense is vacated on appeal. *Sattazahn*, 537 U.S. at 110-11.

Because a finding that increases the maximum punishment for an offense is an element of the offense, the firearm and deadly weapon enhancements create a continuum of the levels of offense, *e.g.* second-degree murder, second degree murder while armed with a deadly weapon, and second degree murder while armed with a firearm. The jury's verdict, finding Nicolas guilty of second-degree murder committed while armed

with a deadly weapon, precludes the court from convicting him of the more serious offense of second-degree murder while armed with a firearm.

Double jeopardy principles do not permit the State to seek a judgment notwithstanding the verdict, no matter how clear or strong the evidence of guilt. *Standifer v. United States*, 447 U.S. 10, 21-25, 100 S. Ct 1999, 64 L. Ed. 2d 689(1980); *State v. Mulins-Costin*, 152 Wn. 2d 107, 116, 95 P. 3d 321 (2004). Even in the face of evidence plainly establishing Nicolas was armed with a firearm at the time of the offenses, double jeopardy principles do not allow conviction on the greater offense.

Double jeopardy bars any effort to uphold the greater conviction on appeal, or to permit the State to seek a verdict on the greater offense on remand. "Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy." *Green v. United States*, 355 U.S. 184, 193-94, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957). When jeopardy has attached to one offense by means of a conviction or acquittal, appeal of a more serious offense as violating double jeopardy does not waive the jeopardy bar attached to the verdict on the lesser offense. *See Benton v. Maryland*, 395 U.S. at 797.

A jury convicted Nicolas of second degree murder committed while armed with a deadly weapon. That conviction prevented, and now bars, any conviction for the greater offense of second degree murder committed while armed with a firearm.

c. CONVICTIONS ON THE GREATER
OFFENSES ARE STRUCTURAL ERROR
REQUIRING REVERSAL.

An error regarding the burden of proof is structural and therefore not subject to any form of structural analysis. *Sullivan v. Louisiana*, 508 U.S. 275, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993).

There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt -- not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

508 U.S. at 280 (citations omitted).

The right to a jury trial under Washington's Constitution, Article 1, §§ 3 and 21, is broader than that guaranteed by the federal constitution. *Pasco v. Mace*, 98 Wn.2d 87, 99, 653 P.2d 618 (1982). The State constitution requires the state to prove every essential element of a crime

beyond a reasonable doubt. *State v. Cronin*, 143 Wn. 2d 568, 14 P. 3d 752 (2000); *State v. Strasburg*, 60 Wash. 106, 118, 110 Pac. 1020 (1910). Harmless error analysis is incompatible with the absence of an actual jury verdict based on properly defined elements found beyond a reasonable doubt.

The error in this case is not merely denial of the right to a jury trial, but also denial of a finding beyond a reasonable doubt. Such error always requires reversal. *Sullivan v. Louisiana*; *State v. Thomas*, 150 Wn.2d 821, 847-49, 83 P.3d 970 (2004).

2. THE INSTRUCTION INCORRECTLY STATED
THE ELEMENTS OF THE DEADLY WEAPON
ENHANCEMENTS.

“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 372, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). The court has a duty to instruct the jury as to every element of the offense charged. *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), *overruled on other grounds* by *State v. Bergeron*, 105 Wn.2d 1, 711 P.2d 1000 (1985); *State v. Emmanuel*, 42 Wn.2d 799, 821, 259 P.2d 845 (1953). When the

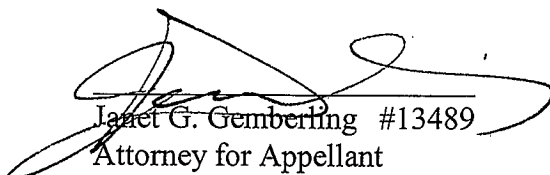
court undertakes to define the offense, the definition must be sufficiently complete so as not to be misleading. *Id.* at 820-21.

Imposition of the deadly weapon enhancement requires a finding the defendant was armed with a deadly weapon other than a firearm at the time of the offense: “[A]dditional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon *other than a firearm* as defined in RCW 9.41.010 . . .” RCW 9.94A.533(4) (emphasis added). Here, the jury was specifically instructed that a deadly weapon included a firearm. (CP 166) Thus, the jury’s special verdict would not support convictions and sentences for second degree murder committed while armed with a deadly weapon.

E. CONCLUSION

This court should reverse the firearm enhancements and strike the resulting mandatory consecutive sentences totaling 120 months of confinement.

Dated this 14th day of January, 2005.


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